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### THE EARLY HISTORY OF ENGLISH BANKRUPTCY.

Writers who deal with the history of English bankruptcy almost unanimously regard the Act of Parliament of 34 & 35 Henry VIII, c. 4 (1542) as the earliest legislation on the subject. Some few, indeed, have even maintained that the first real bankruptcy laws in England were those of 4 Anne, c. 17 (1705), and 10 Anne, c. 15 (1711). It is true that in the modern view of the institution of bankruptcy the Act of Henry VIII can hardly be spoken of as a true bankruptcy law, for it is in fact little more than a criminal statute directed against men who indulged in very prodigal expenditures and then made off.<sup>1</sup> The feature of the Statutes of Anne that has led some authors to look upon them as the earliest English bankruptcy legislation is the discharge of the bankrupt who conformed to the provisions of the law.<sup>2</sup>

It is the purpose of this article to outline the very earliest beginnings of English bankruptcy. In our inquiry, we shall close where others have seen fit to begin; the early eighteenth century will mark the period of our conclusion. In the most ancient

<sup>1</sup> The criminal character of bankruptcy has still survived. Lord Justice Moulton, in *In re A Debtor*, 2 K. B. 66 (1910), said, "What the petitioner seeks by his petition is in the highest degree penal in its consequences. It amounts to loss of civil status, carrying with it grave disqualification."

<sup>2</sup> That the discharge is not indispensable to a bankruptcy law is pointed out in the article on "The Early History of Bankruptcy," 66 UNIV. OF PA. L. REV. 224 (April, 1918).

records of English society and jurisprudence we shall search for intimations pointing to the existence and the gradual development of the various features of the institution of bankruptcy,—the prevention of fraud on creditors, the process of collective execution, and the special management of the insolvent estate during bankruptcy.

### ETYMOLOGY OF "BANKRUPT."

One writer has said: "Perhaps it can in no case be less necessary to investigate the etymology of a word, because the whole system of the bankrupt law is founded upon positive statute.<sup>3</sup> For the purposes of the practitioner this is no doubt true, but for the historian, the etymology and derivation of the word "bankrupt" must be of some value.

Lord Coke says that "we have fetched as well the name as the wickedness of bankrupts from foreign nations; for *banque* in the French is *mensa*, and a *banquer* or exchanger is *mensarius*, and *route* is a sign or mark; as we say, a cart rout is the sign or mark where the cart hath gone; metaphorically, it is taken from him that hath wasted his estate and removed his *banque*, so as there is left but a mention thereof. Some say it should be derived from *banque* and *rompue*, as he that hath broken his *banque* or state."<sup>4</sup> Mr. Justice Heath says<sup>5</sup> that the word comes from the Italian *banco rotto*, but it appears rather to be immediately formed from the Latin *bancus ruptus*.

It is interesting to find that the first time the word is used in English legislation, it is not applied to the agent or person, but to the act or thing, as in the title to the Statute 34 & 35 Henry VIII: "An act against such persons as *do make bankrupt*." It is of further interest to note that, in the pleadings and the commission in bankruptcy, "*decoctor*" was the word used in bankruptcy proceedings, until the statute of 4 George II, c. 26

<sup>3</sup> Cooke, "Bankrupt Laws," p. 1.

<sup>4</sup> 4 Inst. 277; 2 Bl. Com. 472, n.

<sup>5</sup> *Judine v. Da Cossen*, 1 New Reports 234 (Eng. 1805).

(1730).<sup>6</sup> As this word<sup>7</sup> would naturally be construed spendthrift, and as every spendthrift is not a bankrupt, there was always added after it the words, "*Anglice* a bankrupt."<sup>8</sup>

#### LOCAL LAW AND THE LAW MERCHANT.

Prior to the Norman Conquest, "business had hardly got beyond ready money between parties both present," and there was not much room for trade confidences.<sup>9</sup> How far the popular law took any notice of petty trading disputes, such as there were, we are not informed; "it seems likely that for the most part they were left to be settled by special customs of traders, and possibly by special local tribunals, in towns and markets. Merchants trafficking beyond seas, in any case, must have relied on the custom of their trade and order rather than the cumbrous formal justice of the time," and one would think some provision must have been made to protect the merchant creditors of an insolvent trader from fraud on the part of their debtor, a provision common to the law of most continental countries during the Middle Ages.

With the improved conditions of the eleventh century, trade and commerce in England revived, being greatly stimulated by the Crusades. The Gild merchant made his appearance after the Norman Conquest, which widened the horizon of the English trader, and the close union between England and Normandy naturally led to an increase in foreign commerce,<sup>10</sup> which, in turn, must have encouraged domestic trade.

The new transactions of merchants were beyond the scope of the old folk-law of the market. Gradually, the usages of the merchants hardened into a cosmopolitan law, often at positive variance with the principles of local law, but none the less acqui-

<sup>6</sup> All judicial proceedings were in Latin prior to the enactment of that statute.

<sup>7</sup> It is used in Cicero's Oration against Catiline in describing Catiline's army.

<sup>8</sup> Sergeant Goodridge's "Forms."

<sup>9</sup> Sir Frederick Pollock, "English Law Before the Norman Conquest," Essays I, p. 104.

<sup>10</sup> Cunningham, "English Industry," 118, 133; Hallam, "Middle Ages," iii, 23.

esced in for mercantile transactions, and enforced by tribunals of commanding eminence. Occasionally, some special rule of the *Lex Mercatoria* received official sanction from king or parliament, but for the most part, the Law Merchant was obeyed, no one knew why.<sup>11</sup>

Sir Frederick Pollock says,<sup>12</sup> "The Law Merchant, as it existed through the Middle Ages, was undoubtedly a body of cosmopolitan custom, vesting its claim to allegiance not on any express reception by municipal authority, but on its intrinsic reasonableness evidenced by the general consent and usage of the persons concerned. It was recognized and constantly described as being part of the Law of Nature"; and Sir John Davies says, "The Law Merchant, as it is a part of the law of nature and nations, is universal and one and the same in all countries in the world."

The charters granted to merchant gilds and burgesses expressly or by implication recognized the existence of market and other courts, in which the Law Merchant and not the Common Law was administered. The records edited by Professor Gross<sup>13</sup> show that such courts were in working order as early as the first half of the thirteenth century. It would seem that up to the reign of Edward III, the Law Merchant was administered by local courts,<sup>14</sup> for it was not until 1473 that Bishop Stillington, Edward IV's Chancellor, decided that suits between merchant strangers ought to be determined by the law of nature in the Chancery.<sup>15</sup>

Edward Jenks regards it impossible at present to say whether or not any informal bankruptcy process was practiced

<sup>11</sup> Edward Jenks, "Law and Politics in the Middle Ages," *Essays I*, pp. 47-48.

<sup>12</sup> "The Expansion of the Common Law," p. 117. It appears that the Law Merchant was at least partly based on *Roman Law*. Thomas Edward Scruton, "Roman Law Influence in Chancery, Church Courts, Admiralty and Law Merchant," *Essays I*, p. 220.

<sup>13</sup> Publications of the Selden Society, Vol. 23.

<sup>14</sup> William Searle Holdsworth, "History of English Law," Vol. I, pp. 300-337.

<sup>15</sup> "The History of the Law of Nature," *Journ. Soc. Comp. Leg.*, 1900, p. 431; Pollock, "Principles of Contracts," 7th Ed., p. 141.

in any of the old local courts administering the Law Merchant,<sup>16</sup> while W. Blake Odgers and Walter Blake Odgers categorically declare that the institution of bankruptcy was part of the law merchant.<sup>17</sup> Just what the Law Merchant provided, if anything, as to bankruptcy it is difficult to say, the reason for the uncertainty being found in this criticism of Paul Huvelin<sup>18</sup> in speaking of the English writers on the Law Merchant: "Their works are practical rather than scientific."

#### SUMMARY EXECUTION.

The delays incident to legal procedure were from very early time particularly annoying to merchants. A striking feature of the Court of Piepowder was its summary procedure.<sup>19</sup> In the twelfth century custom in some parts of England and Scotland required that pleas concerning wayfaring merchants should be settled before the third tide. The Statute of 13 Edward I, Stat. 3, c. 1,<sup>20</sup> granted summary powers to merchants without process of pleading by "execution against the debtor, both for body, goods and lands."

Summary execution was very early provided for where a debtor was attempting to conceal his goods. In the *Liber Albus*<sup>21</sup> we find a composition between Merchants of London and Amyas, Corby and Nelle, dated 1237: "And that if any one should owe money unto the merchants of Amyas for their said wares, and the same shall be witnessed before the Mayor by the said brokers, or any of them, and the debtor be removing his goods, the Mayor shall send a serjeant to place under arrest the goods of the debtor, to the amount of the debt, until the action shall have been settled, according to the law of the City."

And the following<sup>22</sup> is very significant, indicating as it does

<sup>16</sup> "A Short History of English Law," p. 382.

<sup>17</sup> "The Common Law of England, Vol. II, p. 1388.

<sup>18</sup> *L'Histoire du Droit Commercial* (1904), p. 70.

<sup>19</sup> "Staple Courts," Introduction, Vol. 23 of Selden Society Publications, xxv, xxvi.

<sup>20</sup> 1283.

<sup>21</sup> Pages 362-363, Bk. III, Part III.

<sup>22</sup> Page 194, Bk. III, Part I.

the existence of some sort of collective execution: "Where the goods of a tenant who absconds from the City shall be arrested or appraised at the suit of divers parties, the landlord shall have preference before all others for rent of his house two years in arrear."

#### JEWISH EXCHEQUER.

In the reports of a few cases in the Court of Exchequer of the Jews, we also find hints of the existence of some feature of bankruptcy process. Note the following brief report of a case in Hants, Michaelmas Term, 1244-1245: "Proclamation was made through the synagogues of the Jews of Winchester, that if any Jew or Jewess had any debt to enforce against Wm. Bardulf (Christian) whether his, Bardulf's, own debt or a debt of William de Warenne of Wormgay, he or she should be before *etc.*, on a certain day with the instruments, *etc.* On the day appointed none came, save Elias, son of Chera."<sup>23</sup> And note also the following in Kent and London, Easter Term, 1244: "Proclamation was made through the synagogue of the Jews of London, that if any Jew or Jewess should have any debt to demand of William Belhuncle, he or she should be before the Justices, *etc.*, a month after Easter. And no one came but Elias Le Blund, who produced two chirographs; in one of which it is contained, that the said William owes the said Elias £4, whereof he was to pay 20s. on the feast of St. Michael in the 26th year, and 60s. on the Quindene of the Purification of Blessed Mary; and in the other it is contained, that the said William owes the said Elias 20s., payable at the Nativity in the 28th year. And the said Elias admits, that, should these chirographs not be inrolled in the rolls of the Eyre of Gilbert de Preston, and his associates, those debts would be first."<sup>24</sup>

#### STAPLE RIGHTS.

Legislation favoring merchant creditors is not new, although the distinction between trading and non-trading insolvents appears to be of quite modern origin. There are in the laws of Greece

<sup>23</sup> Pages 18, 41.

<sup>24</sup> Page 9.

special guarantees accorded trading creditors against the person of their debtors, and in the old Slavic law we find provision made that "if one is indebted to a large extent, and a foreign merchant, who is not aware of this fact, has sold him merchandise on credit, in such case the debtor together with all his possessions shall be sold and the proceeds shall be paid first to the foreigner, or to the Crown if it be a creditor."<sup>25</sup> The balance shall be distributed among the other creditors."

Official acknowledgment and registry of indebtedness had to be introduced as soon as trade felt the need of credit. As early as the reign of Henry III, in the period of the Crusades, official records of debts are known to have been in existence,<sup>26</sup> their introduction into England being probably influenced by Continental example.<sup>27</sup> Originally these books of acknowledgments were city institutions and available only to tradesmen.<sup>28</sup> Their importance is indicated by the fact that localities in which trade was highly developed, but in which the officials had no authority to receive acknowledgments of debt, sought measures to obtain this privilege.<sup>29</sup>

Edward I used and made general this institution in the Statute of Acton-Brunell<sup>30</sup> and later in the Statute of Merchants. It was in 1283 that the Statute of Acton-Brunell was passed. The mischief complained of was that merchants who had advanced their goods to others suffered great losses, because no speedy law existed whereby they might recover their debts at the day assigned for payment. In consequence of this deficiency in the state of the law, many merchants had refused to come into

<sup>25</sup> Prawda Ruskaja, XXIII; see Karamsin, *Geschichte des Russischen Reichs*, II, p. 46.

<sup>26</sup> Michel, *Historie du Commerce à Bordeaux*, I, p. 85.

<sup>27</sup> Cf., H. Hildebrand, *Das Schuldbuch der Stadt Riga*; Koppmann, *Das Hamburger Schuldbuch*.

<sup>28</sup> Cf., *Liber Albus*, Bk. II, p. 124, Sec. 113, Ninth Charter of Henry III: "As to taking recognizances of debts between merchants which shall be enrolled in the Exchequer, and that every one shall pay one penny for each pound to be enrolled in the Exchequer."

<sup>29</sup> E. g., Lancaster, in 1432; Rot. Parl., IV, p. 415.

<sup>30</sup> 11 Edward I, followed by 13 Edward I (Statute of Merchants), and 27 Edward III (Statute of Staples).

England to trade. To remedy this, it was enacted that in the cities of London, York, Bristol, Lincoln, Winchester and Shrewsbury, a special process should be adopted. By virtue of this, the merchant had power to summon his debtor before the Mayor, for the acknowledgment of the debt and of the day of payment, which recognizance was to be enrolled. If the debts were not paid, the debtor's goods were to be sold at a fair appraisement and the proceeds delivered to the creditor. If the debtor was insolvent, he was to be imprisoned until a settlement with the creditor should be made.

Within two years after this act was passed, repeated complaints were made by merchants that the sheriffs misinterpreted it. The Statute of 13 Edward I, St. 3, c. 1 (1284), enacted, That after an acknowledgment of the debt and the day of payment, as in the former act, and after a failure of payment, the debtor should be immediately imprisoned. No time was given, no allowance made. Honest or dishonest, refractory or unfortunate, the debtor was to be instantly imprisoned. By Statute of 5 Edward II, c. 33 (1311), it was explained that this statute applied only to tradesmen; and in Edward III's reign measures were sought to meet the problem of the undervaluation of the estate of the debtors.<sup>31</sup>

The Staple authorities had exclusive jurisdiction in all matters pertaining to the Staple, and this jurisdiction was in accordance with the Law Merchant and not the Common Law. Contracts executed in the presence of the Staple officials were conclusive. On maturity, the Staple-Mayor could put the debtor into prison and utilize his goods for the satisfaction of the creditor.<sup>32</sup> If the debtor were not found in that Staple-town, provision was made for the Chancellor immediately to take into custody both the debtor and his possessions wherever they might be found in

<sup>31</sup> Rot. Parl., III, p. 345.

<sup>32</sup> "It is a mistake to suppose that the debtor was punished as an offender," says Maitland. "The imprisonment of a debtor, 'the taking of his body in execution,' was a means whereby the creditor might extort payment and satisfy resentment; but that was his private right." "Justice and Police, p. 73.

the Kingdom.<sup>33</sup> Since all sorts of efforts were made to emasculate this credit system of the Staple, a special statute had to meet this peril.<sup>34</sup>

The Statute of 23 Henry VIII, c. 6,<sup>35</sup> provided that recognizance in the nature of Statutes Staple might be taken by the Chief Justice of the King's Bench and the Common Pleas and other persons, and the Staple Mayors and Constables were confined to their old proper limits, that is, to recognizance of debts concerning goods and merchandise of the same Staple between merchant and merchant of the same Staple.

#### (a) PREVENTION OF FRAUDS.

The Statute of Acton-Brunell,<sup>36</sup> the Statute of Merchants<sup>37</sup> and the Statute de Stapulis<sup>38</sup> were intended to promote the interests of English commerce. They particularly sought to safeguard the foreign merchants who primarily engaged in commerce. As we have seen, solicitude for the trader marks all the enactments. A particular mode was devised to secure to him the payment of his debts, the process of the Common Law being altered for his immediate benefit. It required but a very short experience to show that although commerce was to be protected, the misconduct of merchants had to be restrained as well.

Many of the Lombards, who nearly monopolized the trade of Britain and in whose favor the above mentioned laws were made, were found to have left the kingdom, leaving their creditors without a possibility of redress. By the Statute of 25 Edward III, St. 5, c. 23 (1351), it was ordained that if any merchant of the company of Lombard-merchants acknowledged himself bound in a debt, the company should answer for it. This apparently was due to the fact that the Lombard merchants made a practice of escaping from the country without satisfying their

<sup>33</sup> 27 Edward III, Stat. 2, Chap. 9, Secs. 9, 10, 11, 12, 13.

<sup>34</sup> 11 Henry VI, Chap. 10.

<sup>35</sup> In the year 1532.

<sup>36</sup> 11 Edward I.

<sup>37</sup> 13 Edward I.

<sup>38</sup> 27 Edward III.

creditors. The regulation is based upon a principle quite familiar to our law—the principle that where many are interested to prevent an offense, that offense will probably be less frequently committed.<sup>39</sup>

(b) ROYAL PREROGATIVE.

Evasions by debtors who for one reason or another had gained the favor of the King constituted a peril that had to be fought by Parliament constantly. Royal aid was given the evading debtors by means of a letter of safe conduct issued by virtue of the Royal prerogative. This corrupt practice was frequently restrained by action of Parliament,<sup>40</sup> but since the fifteenth century the kings do not appear to have abused their authority in this way.

(c) ASYLUMS.

Asylums constituted the most dangerous means of evasion by debtor. Officials who followed the debtor into the asylums were excommunicated by the Church and otherwise punished.<sup>41</sup> As the number of asylums increased through the influence of the Abbots,<sup>42</sup> the abuse became more and more intolerable.

In the reign of Richard II the King decreed that Westminster Abbey should be an asylum for only such debtors as were impoverished through adversity and not for those who became insolvent through their own fault and who simply sought to protect themselves from imprisonment.<sup>43</sup> Fraudulent debtors, on the other hand, could be compelled to appear before Court even if they had fled to asylums.<sup>44</sup>

By the Statute of 3 Henry VII, c. 4 (1487), all gifts were made void, where a debtor made a fraudulent transfer to friends

<sup>39</sup> Thus, Counties at the Common Law might be sued for goods taken by robbers; hundreds might be obliged to pay for the damages consequent on riots, etc.

<sup>40</sup> Rot. Parl., I, p. 286; II, pp. 242, 359, 368; III, pp. 23, 28, 164, 593. Cf., *Liber Albus*, Bk. IV, pp. 569, 570; Bk. III, Part I, p. 191; Bk. I, Part II, p. 107.

<sup>41</sup> Rot. Parl., III, p. 345.

<sup>42</sup> Rot. Parl., III, pp. 321, 469; also III, p. 504.

<sup>43</sup> Rot. Parl., III, pp. 37, 51.

<sup>44</sup> 2 Richard II, Stat. 2, Chap. 3.

and lived in an asylum on the rents and income. There had been no remedy for this abuse prior to the reign of Henry VII, except that in a very special case provision was made for contumacy,<sup>45</sup> but this was not of general application, each creditor having to make a special petition to Parliament to receive his remedy. The Statute of 1487 gave a fairly adequate remedy where the fraudulent transfer was intended for the benefit of the debtor himself.

In Henry VIII's reign<sup>46</sup> the number of asylums was limited and only 29 persons were permitted to be at each privileged place. It was not until 1642 that the free towns were abolished altogether.<sup>47</sup>

#### (d) FRAUDULENT CONVERSIONS.

Lord Coke asserts<sup>48</sup> that no complaint was preferred in Parliament nor was any act of Parliament made against any English bankrupt until the 34th year of Henry VIII's reign. Upon examining the statute books, however, we find that although no laws were made against bankrupts specifically by that name prior to that time, yet laws were made against those persons who today are called bankrupts.

One of the first of these is the Statute of 50 Edward III, c. 6 (1376), by which it is provided that "Because divers people inheriting divers tenements, and borrowing divers goods in money or in merchandize, do give their tenements and chattels to their friends, by collusion thereof to have the profits at their will, and after do flee to the franchise of Westminster, of St. Martin's le Grand of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, until the said creditors shall be bound to take a small parcel of their debt, and release the remnant,—It is ordained and asserted, that if it

<sup>45</sup> Rot. Parl., IV, p. 39 (1419).

<sup>46</sup> 32 Henry VIII, Chap. 12.

<sup>47</sup> 21 Jac. I, Chap. 28. A very scholarly treatment of this subject is found in George Schanz's *Englische Handelspolitik gegen ende des Mittelalters mit Besondere Berücksichtigung des Zeitalters der beiden ersten Tudors Heinrich VII und Heinrich VIII*, p. 541 ff. (1881).

<sup>48</sup> 2 Inst. 277.

be found that such gifts be so made by collusions, that the said creditors shall have execution of the said tenements and chattels, as if no such gift had been made."

Although no mention is made of bankrupts, *eo nomine*, two offenses are here referred to that are in the later parliamentary provisions explicit acts of bankruptcy. Flying to a franchise, or taking sanctuary, is so held by the Statute of 13 Elizabeth, c. 7, and the Statute of 1 Jac. I, c. 15. And the latter act also declared that every transfer of property by an insolvent to one not a creditor though for a valuable consideration, unless in trust for creditors, was an act of bankruptcy.

The operation of the Statute of Edward III received, soon afterwards, an additional sanction by the Statute of 2 Richard II, St. 2, c. 3 (1379), which provided that "in case of debt where the debtors make feigned gifts and feoffments of their goods and lands to their friends and others, and often withdraw themselves and flee into places of Holy Church privileged, and there hold them a long time, and take the profit of their said lands and goods so given by fraud and collusion, whereby their creditors have been long and yet be delayed of their debts and recovery, wrongfully and against good faith and reason: It is ordained and established, that after that the said creditors have thereof brought their writs of debt, and thereupon a *capias* awarded, and the Sheriff shall make his return that he hath not taken the said persons, because of such places privileged, in which they be or shall be entered, then after such return made, another writ shall be granted and made to the Sheriff, in which writ shall be comprised that proclamation be made openly at the gate of the place so privileged, where such persons be entered, by five weeks continually, every week once, that the same person be at a certain day comprised in the same writ before the King's justices, there to answer to the plaintiff of his demand; And upon this writ, returned by the said Sheriff, that Proclamation is made in the said form, if the said persons called come not in proper person nor by attorney, judgment shall be given against them upon the principal for their default; And out of the same judgment execution shall be made of their goods and lands, being out of the

place privileged, as well, that is to say, of those lands and goods so given by collusion, as of any other out of the same franchise, after that such fraud or collusion be duly found, in the same manner as that ought to have been, if no demise had been thereof made, notwithstanding the same demise."

The same species of dishonesty still persisted, and a new law was passed in 3 Henry VII, c. 4, where the offences are particularized, and the relief, so far as the creditors are concerned, is identical.<sup>49</sup> These statutes, it is to be noted, avoided fraudulent alienations of property for the use of the debtor himself, but not such alienations for the benefit of others, particularly favored creditors.

Where debtors withdrew themselves so as to evade legal process, the creditors were put to the circuitous procedure of out-lawry. This did not vest the goods of the debtor in the creditors, but in the Crown, so that the relief afforded by it was far from adequate.

In addition to these grievances in the law prior to Henry VIII, to wit, the withdrawal of assets by fraudulent alienations for the benefit of favored creditors, and the withdrawal of debtors so as to evade legal process, there was also the lack of such a thing as rateable distribution of an insolvent's assets among all creditors.<sup>50</sup> There was no execution for the common benefit of all claimants, but they had to run through the same process to recover their several individual debts, there being no general participation of the expense or benefit. Whatever effects each execution creditor obtained possession of, he obtained for his own benefit, exclusive of the rest, and his execution vested in himself no interest in anything but what he actually seized. There

<sup>49</sup> It was enacted *and established* by this statute that all deeds of gift in trust for and to the use of the persons making them shall be void. The use of the words italicized suggests that the act was declaratory, in affirmance of the prior existing law.

<sup>50</sup> The machinery for enforcing individual debts was available in the King's Courts from the thirteenth century onwards. It is unlikely that any customary process would have sufficed to restrain the individual creditor from stealing a march upon his fellows. Jenks, "A Short History of English Law," p. 382. The complaint of Roderick Mors, set forth in Starkey's "England in the Reign of Henry VIII," Ed. Cowper, pp. 140 and 141, removes all doubt as to the non-existence of rateable distribution prior to 1542.

was, furthermore, no provision made for an examination of the debtor or other persons to obtain or to compel a discovery of his effects in order to have them applied in satisfaction of his debts.

The Act of 34 and 35 Henry VIII was an effort to remedy this situation. It aimed to establish a summary proceeding, by which the property of the fraudulent debtor should be at once seized and secured for the benefit of all the creditors, and by which all unfair alienations, even to favored creditors, should be avoided.

#### THE ACT OF 34 AND 35 HENRY VIII.<sup>51</sup>

The statute entitled "An Act against such persons as do make Bankrupt," who are described in the preamble as "chiefly obtaining into their hands great substance of other men's goods, and do suddenly flee to parts unknown or keep their houses,"<sup>52</sup> is typical of the legislation of Henry VIII. Like the many other statutes of the Tudors, it is a lengthy document, with a grandiose preamble, and full of pompous imperial phrases; it condescends to details, and teems with exceptions and saving clauses.<sup>53</sup>

The fundamental principle of the Act of Henry VIII was that, in the case of fraudulent debtors, there should be a compulsory administration and distribution, on the basis of a statutable equity or equality among all the creditors. This, of course, involved a compulsory and summary collection of the assets. Hence the two great features of all bankruptcy law, as we know it today, have their origin in the Act of 1542: a summary collection or realization of the assets, and then an administration or distribution for the benefit of all creditors.

<sup>51</sup> The Act of Henry VIII is very much misunderstood by some historians. Crabb, for instance, is of the opinion that the framers of the statute had in mind the Roman imperial law, which, softening the rigor of the Ten Tables, directed that if a debtor ceded all his goods to his creditors, he was secured from being dragged to prison. Crabb's "History of English Law," p. 455. As a matter of fact, it is clear that the act was aimed solely against fraudulent bankrupts, the causes of most of the bankruptcies of the time being the three kinds of costliness of which Coke speaks, *viz.*, "costly buildings, costly diet, and costly apparel, accompanied with neglect of trades and servants." And because the preamble of this Act resembles that of the Act of Henry VIII directed against fraudulent alienations, Reeves infers that its purpose was merely to meet the case of debtors fraudulently concealing or disposing of

The provisions of the act which deal with the administration and distribution of the estate are quite adequate. A quorum of certain high officials<sup>54</sup> were empowered to dispose of all the debtor's property<sup>55</sup> and to pay all the debts in full, or, at least, rateably, the property to be distributed among the creditors "rate and rate alike according to the quantity of their debts."

It was in the first feature, which must precede the second, that the Act of Henry VIII was defective, for it merely provided generally that the Chancellor and the other officials should "take order" of the matter. What should be done in the matter appears to have been left wholly undefined, and especially as to who should be the authorities practically to execute the law and what powers they should exercise. Possibly for this reason the act does not seem to have been of much practical effect, and we find scant traces of it in the books.<sup>56</sup>

A number of penal provisions are also included in the statute to prevent fraud on the part of the debtor's friends or false claimants. Thus, it is provided that persons concealing assets of the bankrupt were to forfeit double their value, to be recovered by such means as the authorities should think proper, and persons making false claims of debt were to forfeit double the sum demanded. If the offender left the kingdom, the lords were to issue a proclamation commanding him to surrender; and if he did not comply within three months after he had notice thereof, he was to be adjudged out of the king's protection; and in such case, should any one help to convey to him his effects out of the

their goods to their own use or to the use of favored creditors, so as to defraud their other creditors, and evading the process of law by absconding. Reeves, "History of English Law," Vol. 4, p. 381. That the Act in its purpose was far more significant than suggested by Reeves is apparent from an examination of the legislative preliminaries. *Infra*, note 53.

<sup>52</sup> *I. e.*, stopping at home and refusing to allow admission to creditors.

<sup>53</sup> Maitland and Montague, "A Sketch of English Legal History," pp. 107 and 108. The legislative preliminaries, as set forth in the Lord's Journal, indicate that there were two plans before Parliament. Lords' Journal, February 19th, 1542, and April 10th, 1542.

<sup>54</sup> Chancellor, Treasurer, President of the Council, Privy Seal, and the Chief Justices.

<sup>55</sup> Lands as well as chattels.

<sup>56</sup> In the old work, published in 1655, entitled "Body of the Common Law

realm, he was to suffer such fine and imprisonment as the lords should think proper to inflict. The act further provides that after a man was by these means stripped of all his property, he was still liable to all unsatisfied demands.

Of the familiar features of modern bankruptcy process we find here already the power to summon and examine persons believed to be concealing property of the bankrupt, to deal with fictitious or collusive claims, and to punish absconding debtors.

### THE ACT OF 13 ELIZABETH.<sup>57</sup>

The Act of 13 Elizabeth, c. 7, complains that despite the Act of 34 and 35 Henry VIII, c. 4, fraudulent bankrupts had much increased,<sup>58</sup> and it was necessary to make better provision for suppressing them, and to declare who is to be deemed a bankrupt. The Act of Henry VIII does not, in terms, confine itself to traders. The Act of 13 Elizabeth does specifically relate only to merchants or other persons using or exercising the trade of merchandise, by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise, in gross or by retail, or seeking the trade of living by buying and selling,<sup>59</sup> and provides that if any person of that description departs the realm, or keeps his house,<sup>60</sup>

of England as it stood in force before it was altered by statute or acts of parliament or State, Together with an exact Collection of such statutes as have altered or do otherwise concern the said Law," by E. W., no mention whatever is made of the Act of Henry VIII. This might be taken as an indication that rateable distribution was not regarded as something novel, were it not for the complaint of Roderick Mors, *supra*, note 50. It is rather an indication that in its effect the Act of Henry VIII was not of practical importance.

<sup>57</sup> 1570.

<sup>58</sup> In the earlier and very curious statute of 5 Elizabeth, Chap. 6 (1607), prodigal spendthrifts were aimed at. This act insists on cash payment for foreign wares and apparel, except in the case of purchasers who had £3000 a year.

<sup>59</sup> Bankruptcy was confined to tradesmen only because merchants were regarded as having peculiar facilities for delaying and defrauding creditors. The landed gentry of England were not subject to the law which was essentially punitive in its character.

<sup>60</sup> From an early judicial interpretation of the "keep the house" clause, it is evident that bankruptcy was considered analogous to a species of summary outlawry, which involved a seizure of all property in cases where ordinary process could not be executed. *Supra*, p. 14. In an Anonymous Case, in Cro. Eliz. 13, a process issued against a man to arrest him; he "kept

or takes sanctuary, or suffers himself willingly to be arrested for any debt not justly due, or suffers himself to be outlawed, or yields himself to prison, or departs from his dwelling-house, with the intent to defraud or hinder any of his creditors, he shall be taken for a bankrupt.

The management of the bankrupt's property and affairs for the benefit of his creditors is entrusted to such "wise, honest and discreet" persons as the Lord Chancellor shall appoint by commission. The commissioners must pay all the creditors in proportion to their claims, and must make a true declaration of the manner in which they managed and distributed the bankrupt's estate. The "honest and discreet persons" who were to collect and distribute the bankrupt's estate no doubt were intended to be, and in fact were, creditors, who, of course, would be most concerned in the proper, just and speedy liquidation of their debtor's affairs. The authority to administer the estate, under the Act of Elizabeth, was that of the creditors themselves, acting under the commission, and without the cumbrous machinery and formal procedure of a court, it being found that the best course was to allow the creditors themselves, so far as possible, to control the management of the estate.<sup>61</sup>

#### ACTS OF JAMES I.

The Statutes of Henry VIII and Elizabeth treated the bankrupt as a criminal who cheated honest men of their debts. He was liable to imprisonment by the commissioners. Not content with this provision, Parliament enacted in the Act of 21 Jac. I, c. 19 (1623), that pillory and the loss of an ear should be the penalty imposed upon debtor who failed to show that bankruptcy was due solely to misfortune.

his house" to save himself from arrest, but afterwards went out to the market and to other places; and when he heard again of a new process out against him, he kept his house, and afterwards went at large. All the Court held he was not within the statute of bankruptcy, because there remained a means of executing process, which would be deemed to exclude outlawry. This indicates the narrow view with which bankruptcy was at first regarded by the Common Law Courts.

<sup>61</sup> Reeves, "History of English Law," Vol. 5, p. 242. The scope of the statute was clearly set forth in the first case which appears to have arisen under this act. *Case of Bankrupts*, 2 Coke's Reports 24.

In the amending Act of 1 Jac., c. 15 (1603), there was introduced for the first time in English law the now important formal "examination" of the bankrupt as to the conduct of his affairs. The practices of bankrupts, it was complained, were so secret and so subtle that they could hardly be found out or brought to light, and the commissioners were given enlarged powers to imprison offenders, if they were endeavoring to evade full inquiry.

#### THE DISCHARGE OF HONEST INSOLVENTS.

The early eighteenth century, the period with which we close our investigation, shows the first signs of any relenting from the severity of its predecessors towards the unfortunate insolvent. The Statutes of 4 Anne, c. 17 (1705), and 10 Anne, c. 15 (1711), permit an allowance for maintenance to be made to a bankrupt who surrenders, and, even more important, grant him a "discharge" from all debts owing at the commencement of his bankruptcy. It is the feature of the discharge that has caused some writers to regard these statutes as the earliest English bankruptcy laws.<sup>62</sup>

The discharge was the result of the gradual realization of the fact that in many cases the bankrupt might be properly an object of pity, and that the unlimited incarceration of the debtor did not tend to reimburse the creditors at all. The case was first strongly put in a certain Declaration and Appeal<sup>63</sup> drawn up in 1645 and signed by a hundred debtors confined in the Fleet. They were the spokesmen of a large number of persons, as they estimated that there were 8000 debtors thus confined through England and Wales, who urged that the treatment to which they were subjected was unconstitutional. In 1648, when prices were very high, the sufferings of the prisoners were notoriously severe.<sup>64</sup> It was not until September and December, 1649, that acts were passed providing for the discharge of poor persons

<sup>62</sup> *Supra*, p. 1.

<sup>63</sup> Brit. Mus. 669, p. 10.

<sup>64</sup> Coke, "*Unum Necessarium*, or The Poor Man's Case," p. 42 (1648).

unable to pay their creditors;<sup>65</sup> prisoners whose possessions were not worth more than five pounds, besides their clothes and tools, were to take an oath to that effect before the justices, and after due notice was served on the creditors, the prisoners were to be discharged.<sup>66</sup>

The Acts of Anne provided that honest insolvents should be granted their discharge if they complied with the requirements of the law. This provision was probably the consequence not only of pity, but also of the feeling that mercantile credit is given in the interest of the creditor as well as of the debtor; that the giving of credit necessarily involves some risk; that it should be the business of the trader to insure against this loss by adding on a percentage for the credit which he advances; and that all the debtor ought to pledge is his estate, not his future earnings, and certainly not his personal liberty.<sup>67</sup>

By the Act of 4 and 5 Anne, c. 4, the bankrupt was entitled to his certificate without any opposition by the creditors, upon the adjudication of the commissioners. The granting of the discharge was regarded as a judicial act to be exercised by the commissioners, the bankrupt being entitled to his discharge when

<sup>65</sup> Schobell, Acts, 1649, Vol. I, 47, 49.

<sup>66</sup> Further acts were passed in April, 1652, and October, 1653. Schobell, Acts, Vol. I, 265. The Restoration Parliament adopted the measures passed under the Commonwealth, and acts on behalf of insolvent debtors were passed in 1671 (22 and 23 Car. II, Chap. 20) and in 1678 (30 Car. II, Chap. 4). Statutes had nevertheless to be enacted aimed against those who remained in prison by preference, as a means of evading just claims that might be made against them. Thus, in 1653, the debtors of the Upper Bench were ordered to "show cause why their estates should not be sequestered for payment of their just debts," Whitlock, "Memorials," p. 555; and a clause in the Act of 13 Car. II, Stat. ii, Chap. 2, par. 4 (1661), facilitates proceedings against "many persons" who "out of ill intent to delay their creditors from recovering their just debts, continue prisoners in the Fleet."

<sup>67</sup> The leniency of the Act of Anne was not without its dangers, for a distinctly severer tone is noticeable in the next great bankruptcy act, that of 5 George II, Chap. 30 (1732). This Act seems to hint that people deliberately "brought on" their own bankruptcies for the sake of getting rid of their liabilities. It therefore provides that the bankrupt is not to obtain his discharge unless a certificate of due compliance with the law is furnished by his Commissioners, with the consent of four-fifths of the creditors, to the Lord Chancellor. The Act of 1732 is also of interest as introducing the institution of the "assignee," appointed by the Commissioners at first, and later by the creditors, to give closer attention to the bankrupt's affairs than it was possible for the Commissioners to give.

the majority of the commissioners certified to the Great Seal that the bankrupt had conformed with the law.

With the introduction of the discharge, English law had all the elements of modern bankruptcy. The subsequent history of English bankruptcy has to do principally with the management and administration of the bankrupt's estate, the question uppermost in the minds of the legislators being whether the State or the creditors should have the dominant authority over the proceedings.

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